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No. 187

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In the Supreme Court of the United States

OCTOBER TERM, 1961

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
EL PASO NATURAL GAS COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Reply Brief for the Petitioner

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In accordance with Rule 41(3) of the Revised Rules of the Supreme Court of the United States, the petitioner, the People of the State of California, submits this brief in reply to the brief for the Federal Power Commission (Commission), and to the brief for the respondent El Paso Natural Gas Company (El Paso).

California has contended that it was error for the Federal Power Commission to proceed to determine the applications to merge of El Paso and the Pacific Northwest Pipeline Company (Pacific) in the presence of an unresolved anti-

trust suit attacking El Paso's antecedent stock acquisition. To this it is answered by respondents and by the Court of Appeals that the Commission has acted entirely within the jurisdiction and discretion confided to it by Congress. California contends in reply that this position is demonstrably erroneous.

ARGUMENT

I.

The Commission's Order Approving the Merger, as Affirmed by the Court of Appeals, Is Not Within Its Jurisdiction.

In affirming the Commission's order approving the merger of El Paso with Pacific, the Court of Appeals recognized that the Natural Gas Act gave the Commission no explicit grant of power to approve stock transactions between companies otherwise within its jurisdiction. But almost in the same breath, the Court apparently held, that where 99.8% of the stock of a company is acquired, as in this case, the transaction becomes tantamount to an acquisition of assets, and hence subject to Commission approval. From this it would follow that an acquisition of stock (assets), if approved by the Commission, could not be the subject of an antitrust prosecution in view of the exemption provisions of Section 7 of the Clayton Act.

The Commission's Construction.

That the decision below is subject to this construction, and that it is presently thus construed by the Commission, is not open to argument in view of the Commission's order to show cause of December 13, 1961, issued to the Humble Oil and Refining Company (Brief for the Commission, App. B, pp. 78-82). After reciting the facility acquisition clause in Section 7(c) of the Natural Gas Act, it is said,

> "Humble has not filed any application pursuant to Section 7 of the Natural Gas Act for permission to acquire the *facilities* of Olin Gas Transmission, *which*

> *acquisition will result from the exchange of stock between Humble and Olin Oil and Gas.*" (Brief for the Commission, App. B, p. 79). (Emphasis added)

Humble resisted this order with a motion to dismiss upon the ground that the Commission did not have jurisdiction over the stock acquisition, however the motion was denied without prejudice to Humble's right to raise this contention during the course of the hearings upon the order. (App. A, *infra*)

Congressional Silence.

Had Congress intended the Commission to have jurisdiction over transactions involving fundamental corporate changes such as the El Paso-Pacific stock interchange, it would have clearly set out explicit provisions in the Natural Gas Act. The silence of Congress in this respect becomes even more significant when the Natural Gas Act is compared to the Interstate Commerce Act. The latter act expressly authorizes the Interstate Commerce Commission to approve the consolidation or merger of properties or franchises into a single corporation:

> "• • • or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; • • •" (§ 5(2)(a)(i), Interstate Commerce Act, 49 U.S.C. § 5.)

Furthermore, the Motor Carriers Act, after which the Natural Gas Act is purportedly modeled, expressly endows the Interstate Commerce Commission with powers of wide scope over the issuance of securities by motor carriers (§§ 214 and 20a, Interstate Commerce Act; 49 U.S.C. §§ 314 and 20a).

Yet the Natural Gas Act, that "pervasive scheme of regulation" contended for by respondents, contains neither

provisions concerning the acquisition of control by stock ownership or otherwise, nor provisions concerning the issuance of securities (Act of June 21, 1938, c. 556, § 1 *et seq.*, 58 Stat. 821; 15 U.S.C., Chap. 15-B).

Powers Not Granted by the Clayton Act.

Nor can it be said that the Commission has power to do this thing because of authority granted by the Clayton Act. The exemptive provision of Section 7 of the Clayton Act provides that,

> "Nothing contained in this section shall apply to *transactions duly consummated* pursuant to authority given by * * * the Federal Power Commission * * * *under any statutory provision vesting such power in such Commission* * * *"* (Oct. 15, 1914, c. 323, § 7, 38 Stat. 731; Dec. 29, 1950, c. 1184, 64 Stat. 1125.) (Emphasis added.)

It is obvious from the language here used that Congress thereby did not grant any power to any of the named agencies. Reference is expressly made to statutory provisions other than the instant provision. And in any case, Congress specifically rejected the notion that it was thereby granting any new power to the agencies.

> "* * * it is not intended that * * * any * * * agency included in (the last paragraph of section 7) * * * shall be granted any authority or powers which it does not already possess." (S. Report No. 1775, 81st Cong., 2d Sess., p. 7.)

If the decision of the Court of Appeals is allowed to stand, the Commission will be invested with power over intercorporate acquisitions of control and stock transactions which the statutes do not give it, which Congress did not intend it to have, and which no party in this proceeding,

including the Commission itself, has ever contended that it had. (See also, Note, *14 Stan. L.R.*, p. 155 at pp. 157 and 159.)

II.

The Commission's Generalized Conclusions Concerning Lessening of Competition Are Not Supported by the Record and Fall Short of Its Duty Under the Natural Gas Act.

Whether it is held that the Commission has authority to pass upon the legality of stock acquisitions, as the Court of Appeals has held, or whether it is held that the Commission's duty under the Natural Gas Act is merely to consider the national antitrust policy in accord with the teaching in *City of Pittsburgh v. F.P.C.*, 237 F.2d 741 (CADC, 1956), it cannot be said that its generalized conclusions on the subject of competition are supported by the record made before it.

No Adversary Presentation.

First of all, it must be remembered that there has been no adversary development of the record with respect to the effect of the proposed merger upon present or future competition. The Department of Justice, although invited to do so, did not appear in the Commission proceedings. It properly did not do so (*United States v. Radio Corporation of America* (1959) 358 U.S. 334) since the matter already was pending in the only competent forum for an antitrust proceeding. No other party before the Commission possessed facts relating to the charged antitrust violation, and to require any such party to obtain such information would not only have imposed an intolerable burden, but would have unduly prolonged the already lengthy Commission proceedings. In fact, most of the information on this topic placed in the record was based solely on self-serving reports rendered by the applicants themselves.

Official Notice.

A prime example of the Commission's easily-stated and generalized conclusions upon this subject is its finding that there was a tendency for competition to develop for the California market (R. 1188, 1296). The nature and extent of this competition is not disclosed. The evidence upon which this finding is based is the Commission's official notice of a project not yet approved nor yet in being. From this can it be inferred that such competition would be so substantial as to render Pacific's potential competition insubstantial? Is it to be presumed that at the time of the Commission's decision in this case that it had pre-judged the Pacific Gas Transmission case? And most important, what kind and degree of competition will exist between the Pacific Gas Transmission Company and the then-to-be-merged companies? We do not know. California does not contend that the Commission cannot take official notice of applications filed with it, but the scope and numbers of inferences to be drawn from such notice are not without limit. At the very least, we are entitled to know precisely what inferences were drawn therefrom (See, e.g. *Ohio Bell Tel. Co. v. P.U.C. of Ohio* (1939) 301 U.S. 292 at 305, 306).

Consumer Costs.

Another example of the insufficiency of this record to support the findings made upon the antitrust aspects of this case, is the Commission's complete unwillingness to consider the effect of increased costs upon the consuming public (R. 1303).

The Natural Gas Act was enacted to protect "consumer interests against exploitation at the hands of private natural gas companies." (*F.P.C. v. Hope Natural Gas Co.*, (1944) 320 U.S. 591.) Surely, cost is an inherent element of exploitation. So if the Commission were to be concerned

only with problems of regulation under the Natural Gas Act alone, the cost impact of proposed projects upon the consumer would be a very material issue.

But if this issue is material under the Natural Gas Act, it should become so important as to be dispositive in the presence of claimed violations of the antitrust laws. Just as the Natural Gas Act was enacted to prevent exploitation of the many by the few, so were the antitrust laws. For the Commission to ignore this issue is for it to make of its discussion of the possibilities of competition between Pacific and El Paso mere exercises in sterility and abstraction. Without consideration of costs, the prospect of competition or the lack thereof becomes a subject without content. (Cf. *Federal Communications Commission v. RCA Communication, Inc.* 346 U.S. 134)

Economic Concentration.

El Paso has cited to the court exhaustive and extensive legislative history upon the Congressional intent in the enactment of Section 7(c) of the Natural Gas Act (El Paso Brief, pp. 190-223). Analysis of this material inevitably indicates that Congress, in its treatment of this section was primarily concerned with the Commission's ability to regulate competition between parallel gas lines into given market areas. It was not concerned with providing the Commission with sanctions, through the use of its certificate power, against the massing, through stock acquisitions, of vast amounts of economic power. This conclusion is buttressed by the fact that Congress failed to provide the Commission with authority over intercorporate mergers and stock acquisitions (See pp. 3, 4, *supra*).

Yet, extreme concentration of economic power is certainly one of the most important aspects in the formation of unlawful trusts. This fact was noticed by the Federal

Trade Commission in its report on natural gas pipelines to the Temporary National Economic Committee (Monograph No. 36, p. 21). What did the Commission have to say with reference to this question?

> "• • • The physical integration of the two systems will make the unified system one of the largest in this country. There is doubt in this record as to which would be the largest in the country after the merger, El Paso or Tennessee Gas Transmission Company. It will have markets in all the States of the Pacific Coast, and along its pipelines from Mexico to Canada. *This great size should not be permitted to bring awe into the picture here so as to distort the views of one giving consideration to the issues.* Certainly a large evildoer is capable of more evil than a small one. Nevertheless, an immense pipeline system may be in the public interest just as well as a smaller one. There are a good many giants among American industries, both regulated and unregulated." (R. 1183, 1184)

This is the last reference in either of the Commission's opinions to the fact of El Paso's size. No attempt was made to determine what effect the size of this corporate giant would have upon the applicants which the Commission thought might serve the California market in the future. Just as costs were arbitrarily divorced from the Commission's consideration, because they were thought to be covered by another section of its statute, this issue was knowingly ignored.

III.

The Commission Prematurely Determined the Antitrust Issue.

Had only the Commission granted California's motion to stay its proceedings, pending determination of the antitrust litigation in the district court, the missing elements in

its record would have been supplied and resolved in the forum most competent to try and determine such issues. California submits that the Commission's denial of its motion for stay in the circumstances of this case was an abuse of the Commission's discretion.

We do not know today whether the acquisition of assets which the Commission approved was or was not the fruit of an unlawful transaction. The Commission has no power to make this determination (*City of Pittsburgh v. F.P.C.*, 237 F.2d 741). No provision in the Natural Gas Act gives it the power to "immunize" such transactions (Cf. § 5(11) of the Interstate Commerce Act, 49 U.S.C. § 5(11). And it certainly cannot be contended that the exemptive provision in Section 7 of the Clayton Act *grants* to the Commission the power to immunize such transactions (See p. 4, *supra*). This issue should have been decided by the district court before the Commission issued its certificate of public convenience and necessity.[1] The Commission's failure to permit expert resolution of this issue amounted to a failure to observe the mandate of the Court of Appeals in *City of Pittsburgh v. F.P.C., supra.*

El Paso contends that the Commission is endowed with such a "pervasive scheme of regulation" as to displace the possibility of any deferral to prior judicial action. It is further contended that for the Commission to defer to judicial action in order to obtain a clear cut settlement of the antitrust issues inherent in this case would be to require the Commission to submit to "sporadic action" which would cut the "heart" out of the Natural Gas Act.

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1. For an objective opinion upon this question, the Court's attention is invited to the case note appearing in Vol. 14 of the Stanford Law Review at page 155 (December 1961).

There does not exist the comprehensive scheme of rate regulation that El Paso contends for. We have already noted that the Act gives the Commission no power to regulate the issuance of securities or the acquisition of control of natural gas pipeline corporations. But moreover, there does not exist that degree of rate regulation which would justify the characterization of the Natural Gas Act as a "pervasive scheme." The Natural Gas Act does not require a pipeline corporation to justify increases in rates before they go into effect. Under Section 4 of the Act, a company need only file its increase, and subject to the five month suspension rule, the rates go into effect. Presumably the consumer is protected by the refund provisions of Section 4, but hearings on such increases are not usually held until years after the initial filing (See Brief for Petitioner, p. 47). In the interim, the pipeline corporation can pancake increase on top of increase, and usually does (See Brief for Petitioner, p. 47). Moreover, the refund provisions are an illusory protection since in any subsequent hearing the ability of the company to make such refunds is a material issue. This Court is well aware of the problem (See *Atlantic Refining Company v. Public Service Comm. of New York*, (1959) 360 U.S. 378).

Rate regulation as ineffective as this is tantamount to no rate regulation.

Furthermore, the Commission itself disclaimed the merger to have any relationship or effect upon the rates of the merged companies. Thus, at page 1303 of the record, the Commission says:

> "As the presiding examiner shows, the merger will not of itself result in any rate change, and El Paso does not propose to make any change in its filed rates or Pacific's filed rates as a result of the merger. In fact, El Paso's president gave assurance that no new

rate increases to Pacific's present customers would be filed with the Commission for at least one year from the date of the approval of the merger by the Commission. *Thus any effect which the merger may have on rates is not before us at this time* * * *." (Emphasis added.)

The Commission was well aware of the motive of the respondent El Paso in applying to it for approval of the proposed merger. For business reasons (R. 1436) the companies had exchanged their stock prior to applying to the Commission. The government's antitrust suit ensued. It is not unreasonable to infer, since the company admitted that its application was "considerably stimulated" by that suit, as the Examiner (R. 1183), the Commission (R. 1293), and the Court (R. 1437) so found, that the prime purpose of the application was to avoid its consequences.

There is no pervasive regulatory scheme, nor any rate structure to be thrown out of balance by prior judicial action in this case. There is no justification for primary administrative jurisdiction.

"* * * The facts of this case illustrate that analysis. Appellees (*respondents*) like unregulated business concerns, *made a business judgment as to the desirability of the exchange*. Like unregulated concerns, they had to make this judgment with knowledge that the exchange might run afoul of the antitrust laws. Their decision varied from that of an unregulated concern only in that they also had to obtain the approval of an administrative agency. But scope of that approval * * * was limited to the statutory standard of 'public convenience and necessity.' * * * In every sense, the question faced by the parties was solely one of business judgment (as opposed to regulatory coercion), save only that the Commission must have found that the 'public interest' would be served by their decision to make the exchange. *No pervasive*

regulatory scheme was involved." (United States v. Radio Corporation of America, 358 U.S. 336 at 365-6.) (Emphasis added.)

In permitting the respondent El Paso to carry through its Section 7(c) application to finality, the Commission permitted El Paso to abuse its process. In failing to refer the issues under the Clayton Act to the district court, the Commission abused its discretion.

CONCLUSION

The Commission has no authority to enforce the antitrust laws. It has no authority to pass upon the lawfulness of acquisitions of control through the exchange of stock. It has no authority to immunize such transactions from the operation of the antitrust laws.

The Court of Appeals has granted to the Commission this authority without Congressional sanction. Its decision should be reversed.

The Commission has attempted to resolve the competitive, antitrust aspects in this case under its statute upon an insufficient record. In order that a sufficient record be established, it is necessary that this case be remanded to it with instructions to reconsider the entire case in the light of the eventual decision in the pending antitrust litigation.

Respectfully submitted,

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(Appendix Follows)

APPENDIX A

Foster Associates Report, No. 308, February 8, 1962
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FPC DENIES HUMBLE MOTION TO DISMISS PROCEEDING INVOLVING ACQUISITION OF OLIN GAS TRANSMISSION STOCK; ADVANCES HEARING DATE TO MARCH 2

On 1/5/62 the FPC denied a motion by Humble Oil & Refining Co. (CI62-627) for vacation of the Commission's order of 12/13/61 directing Humble to show cause why it should not file an application to obtain authorization for its proposed acquisition by stock ownership of the properties of Olin Gas Transmission Corp., an interstate pipeline company. (See REPORT NOS. 300, pp 1-2; 305, pp 2-3.) Humble filed a response to the show cause order requesting termination of the proceeding together with an FPC ruling of non-jurisdiction over the stock acquisition or, alternatively, prompt issuance (after a non-contested hearing) of a certificate (if such is found to be required) authorizing the stock acquisition. In the event of denial of both requests, Humble asked that the hearing date be advanced from 3/27/62 to 2/19/62.

The FPC denied the motion for termination of the proceeding without prejudice to its renewal at a later stage of the case (after presentation of evidence by Humble). The motion for issuance of a certificate after an abridged hearing was denied on the ground that, without a record, the Commission would not be in a position to make a determination of the issues involved in certification. It was held, however, that advancement of the hearing to 3/2/62 was in the public interest.

Noting that Humble's response to the show cause order was based on the argument that acquisition of Olin's stock

is not an "acquisition of facilities" within the meaning of Section 7(c) of the Act, the FPC stated that the show cause order does not preclude Humble from asserting this contention in the course of the proceeding. The Commission made clear, however, that its instant order should in no way be construed as a determination by it at this time of the legal question of jurisdiction raised by Humble.